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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 841

MONSANTO COMPANY, ROTARY DRILLING SERVICES, INC., AND PETE BARTLETT,

Petitioners,

v.

CHEROKEE LABORATORIES, INC.,

Respondent.

PETITION OF MONSANTO COMPANY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION OF MONSANTO COMPANY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Monsanto Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on July 25, 1967.

CITATIONS TO OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit, printed in Appendix A, p. 11, had not been reported when this petition was printed.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 25, 1967. (R. 2067, Appendix A, *infra* at p. 28). Rehearing was denied on September 13, 1967. (R. 2088.) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether a statutory monopoly granted by a lawfully obtained patent can become violative of Sections 1 or 2 of the Sherman Act when the patentee has done nothing more than: (1) select a single distributor to whom alone it would sell the patented product, without restriction as to price, sales territory or customers; and (2) refused to sell to or create one or more competing distributors.

STATUTES INVOLVED

The statutory provisions involved are Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2, as amended, 15 U.S.C. §§ 1, 2 (1955),[1] and Section 154 of the Patents Act, 35 U.S.C. § 154.[2] They are printed in Appendix B, pp. 29, 30.

STATEMENT

This is a private treble damage antitrust suit presenting a new and unique question involving the unilateral program of a single manufacturer. It goes well beyond the factual situation confronting this Court in *United States* v. *Arnold, Schwinn & Co., et al.*, 87 Sup. Ct. 1856 (1967). The controversy here centers around a product known as Lytron 886 (hereinafter Lytron) and its manner of distribution to the ultimate consumer. Lytron was developed by Monsanto Company (hereinafter Monsanto) which secured, on September 15, 1953, a patent covering its composition and manufacture. (R. 113; 436). This patent granted to Monsanto for a period of seventeen years from that date "the right to exclude others from making, using, or selling the invention throughout the United States". 35 U.S.C. § 154. Although initially conceived as a soil conditioner for agri-

[1] Act of July 2, 1890, 26 Stat. 209.

[2] Act of July 19, 1952, 66 Stat. 804.

cultural application, it was later discovered to have more value as a drilling mud additive in the drilling of certain oil and gas wells in which low solids drilling fluids could be used — potentially at least 5,000 wells out of 55,000 to 60,000 drilled in this country in a single year. (R. 1327; 1259). Monsanto sold small amounts of Lytron directly to oil and drilling mud companies during the period 1953-59. (R. 114). In 1956, it had, for the first time, sold some Lytron to Rotary Drilling Services, Inc. (hereinafter Rotary) (R. 1334). Rotary, in turn, sold the product at that time through manufacturers' representatives to the oil industry. (R. 121).

On March 25, 1960, Pan American Petroleum Corporation applied for a "use patent" covering the use of Lytron and any similar product as a drilling mud additive.[3] (R. 121). A "use patent" is a patent directed to the use of one patented product — such as Lytron — in conjunction with certain other agents in a particular use area — here as a drilling mud additive. Although Lytron had been in use as a drilling mud additive prior to Pan American's patent application, it was the unique combination of abilities to flocculate (settle out) drill solids and beneficiate (extend or expand) the drilling mud that Pan American's use patent was intended to exploit. Effective January 1, 1960, Pan American, as the "use patent" holder, granted Rotary a nonexclusive license to sell such products having this combination of uses. (R. 121, 122).

In about June, 1960, Rotary made its first sale of Lytron to Cherokee Laboratories, Inc. (hereinafter Cherokee). (R. 1364). At that time — and until January, 1963 — Rotary did not have a sales organization of its own and Cherokee made direct sales of the product through its sales force to mud companies in the oil and gas well drilling industry. (R. 122).

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[3] The "use patent" was issued on December 25, 1962 (R. 121)

On February 13, 1961, Monsanto and Rotary entered into a letter agreement whereby Monsanto agreed to supply Rotary with its full requirements of Lytron and to refer to Rotary all potential oil field drilling industry customers. For its part, Rotary agreed to promote the product, at its expense, and both parties agreed to consider renewal of the agreement in two years. (R. 115-117).

From 1960 until January, 1963, (which includes a period of almost two years after it signed the initial agreement with Monsanto) Rotary continued to sell Lytron exclusively to Cherokee for resale to the mud companies who were the principal customers for the product. Cherokee was the only concern selling the product to such customers during this period and Lytron became one of its most important products.

In January, 1963, Rotary hired the ex-president of Cherokee and four ex-Cherokee salesmen and began selling Lytron directly to the mud companies. (R. 1410; 1411). Rotary contends it did nothing to cause this turnover but Cherokee claims the employees were "pirated" away by Rotary. Monsanto did not have anything to do with the switching of personnel between Rotary and Cherokee. (R. 880; 881). For purposes of this petition, however, the Court is asked to assume, *arguendo,* that Monsanto knew of this change of employees when, in January, 1963, it renewed its letter agreement with Rotary. (R. 123). The February, 1961 letter agreement between Monsanto and Rotary and its 1963 renewal, are the only formal agreements between the parties. At no time did Cherokee have any written agreement or contract with either Rotary or Monsanto nor, until April 8, 1964 (after this suit was brought), did it acquire from Pan American, a license to sell additives such as Lytron. (R. 822, 823).

When, in 1963, Rotary began the direct sale of Lytron to the mud companies, it raised its price to Cherokee — in effect charging Cherokee a "retail" rather than a "wholesale" price. (R. 1798). The price Rotary charged the ultimate consumers after it took back the exclusive sale of Lytron from Cherokee was never more, and in some cases less, than Cherokee had charged when it was the sole outlet. (R. 1799, 1801). At no time did Monsanto increase its price to Rotary. When Cherokee saw it could not profitably continue to get Lytron from Rotary, it turned for the first time to Monsanto. (R. 1490). Monsanto refused to sell directly to Cherokee and thus make it a distributor of Lytron. Cherokee contends Monsanto's refusal to sell was based on its letter agreement with Rotary which Cherokee calls an "exclusive dealership" agreement. Later, Cherokee tried to market a competing product which its field tests showed was just as good as Lytron and which it represented to be an improvement over Lytron. (R. 1720) This effort failed. Cherokee has sued Monsanto and Rotary for treble damages claiming violations of Sections 1 and 2 of the Sherman Act, Section 3, Clayton Act[4] as well as the Texas Antitrust Law. Federal jurisdiction in the District Court was based upon 15 U.S.C. §§ 15, 22. The trial court directed a verdict for all defendants at the conclusion of Cherokee's evidence on both the federal and state claims. The Court of Appeals for the Fifth Circuit reversed and remanded the case for trial on the federal antitrust action but affirmed as to the alleged state violation. No appeal has been taken by Cherokee from that part of the Court's judgment. Among the issues considered by the Court of Appeals was Monsanto's claim of exemption from antitrust prosecution because of its Lytron patent. The Court summarily dis-

[4] Cherokee voluntarily dismissed its Section 3, Clayton Act claim at the conclusion of its evidence. (R. 2034)

missed Monsanto's patent rights holding that the first sale of Lytron from Monsanto to Rotary "exhausted" Monsanto's patent monopoly. Monsanto seeks now to have that judgment reviewed — and the trial court's judgment ultimately affirmed — on the ground that Monsanto here has done nothing more than exercise rights lawfully granted to it under its patent on the product in controversy — and therefore should not be subjected to prosecution for treble damages under the Sherman Act.

REASONS FOR GRANTING THE WRIT

1. This case is in direct and irreconcilable conflict in principle with the many decisions of this Court which proscribe a private antitrust remedy where legitimate patent rights are lawfully exercised. There is no question — and Monsanto does not dispute — "that where a patentee makes the patented article and sells it, he can exercise no future control over what the purchaser may wish to do with the article after his purchase." *United States* v. *General Electric Company et al,* 272 U.S. 476, 489 (1926). But in the instant case, Monsanto did not exercise any degree of dominion or control over the Lytron once it had been sold to Rotary. Nor did Monsanto seek to impose any restraint whatsoever upon Rotary — or Cherokee while Cherokee was the sole outlet — as to price, sales territory or customers with respect to the product. In short, Monsanto has not overstepped legitimate rights granted it by law to "exclude others from making, using or selling the invention." 35 U.S.C. § 154; *Bement* v. *National Harrow Company,* 186 U.S. 70 (1902).

More recently, in *Sears, Roebuck & Co.* v. *Stiffel Company,* 376 U.S. 225 (1964) the Court had occasion to articulate the rule: (p. 229)

> "The grant of a patent is the grant of a statutory monopoly. . . . Patents are not given as favors . . . , but are meant to encourage invention by rewarding the inventor with the right, limited to a term of years fixed by the patent, to exclude others from the use of his invention. *During that period of time, no one may make, use, or sell the patented product without the patentee's authority. . . .*" (Emphasis added)

Monsanto certainly recognizes that a patent grant has limitations and does not insulate the patentee from antitrust prosecution where there is a misuse of the patent or where it has been fraudulently obtained. See, e.g., *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U.S. 488 (1942); *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965). But the Sherman Act does not abolish a patentee's right of control over making, selling or using the patented article. Here, Monsanto chose to make Rotary — and not Cherokee — a distributor to sell its "highly specialized" patented product in a "very limited market."[5] How Rotary chose to get the product to the consumer was of no concern to Monsanto just as Monsanto was not concerned with the price Rotary charged, the territory in which it sold the product or the customers to whom the product was sold by Rotary. Certainly, Monsanto had no objection to Rotary selling through Cherokee — or any other outlet. What Monsanto was concerned with, and by law entitled to, were the legitimate fruits of its patent, which it could best obtain in the "very limited" market concerned by establishing a single wholesale distributor and not a series of competing distributors.

Monsanto looks to this Court for guidance. If the method it chose of distributing Lytron has put it in jeopardy of

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[5] The product and the market were thus described by the Court below. See Court's opinion, p. 12, *infra*.

violating federal law, then Monsanto is anxious to change it system now and in the future, if for no other reason than to avoid the not inconsiderable burden of defending treble-damage antitrust suits brought by disgruntled would-be distributors of its products. It can only change its system, however, in one of two ways: first, by making everyone a distributor who asks to be — which is Cherokee's contention in this case. Obviously if the product is "highly specialized" and the market "very limited" as in the instant case, a proliferation of distributors — or even the addition of one competing distributor — can so dilute each distributor's profit that any incentive for promoting the product is lost. Second, Monsanto can market the product directly to the consumer — by-passing all independent distributors. This alternative would only insure the extinction of the independent distributor system and accelerate the trend toward complete vertical integration of the entire distribution process. See, *United States* v. *Arnold, Schwinn & Co.*, 87 Sup. Ct. 1856 (1967).

2. The Court below determined that a possible fact issue existed in this case as to whether or not Monsanto and Rotary monopolized or attempted to monopolize the market in violation of Section 2, Sherman Act. This holding is in direct conflict with the rule announced in *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965). There, this Court held "that a treble damage action for monopolization which, but for the existence of a patent, would be violative of § 2 of the Sherman Act may be maintained under § 4 of the Clayton Act [treble damage statute] if two conditions are satisfied: (1) the relevant patent is shown to have been procured by knowing and willful fraud practiced by the defendant on the Patent Office or, if the defendant was not the original patent applicant, he had been enforcing the patent with knowledge of

the fraudulent manner in which it was obtained; and (2) all the necessary elements otherwise necessary to establish a § 2 monopolization charge are proved." 382 U.S. 172 at 179. Neither condition was satisfied in the instant case.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Thomas M. Phillips

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Counsel for Petitioner,
Monsanto Company

CERTIFICATE OF SERVICE

A copy of the Petition of Monsanto Company for a Writ of Certiorari in the above styled case has been served on Mr. Jack N. Price, 422 N. Green Street, Longview, Texas, by depositing same in a United States mail box, with first class postage prepaid on November ...., 1967.

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